## HAJI ABDUL RAHMAN BIN LISI v. HAJI HASSAN BIN HAJI YUNOS

**[O.C.J. (Yusof Abdul Rashid J.) January 2, 1982]**
**[Johore Bahru — Civil Suit No. 368 of 1981]**

*Practice & Procedure – Leave to intervene – Application for – Principles applied by Court – R.H.C. 1980, 0. 15 r. 6(2)(b)*

The plaintiff entered into sale agreements with twelve individuals (the Purchasers) on November 1, 1980. The Purchasers were represented by the defendant, a solicitor, to sell the whole issued and fully paid-up shares numbering 1,907,480 in all of a limited company known as Gabongan Putra Sdn. Bhd. The plaintiff by November 24, 1980, had delivered the Share Certificates and the Share Transfer Forms duly executed by the plaintiff relating to the said shares to the defendant pursuant to the said sale agreements to hold the same in the defendant's custody as stakeholder.

On September 26, 1981, the plaintiff, alleging that the Purchasers had breached Clause 11 of the sale agreements, purported to rescind the said sale agreements. The plaintiff demanded the return of the said documents from the defendant. The defendant refused to return them and the plaintiff brought this action in court claiming for a court order to compel the defendant to return the said documents. The defendant entered appearance and the plaintiff applied for a summary judgment under 0. 14. The Purchasers filed a summons-in-chambers seeking leave to intervene under 0. 15 r. 6(2)(b), R.H.C. 1980.

The issue before the court was whether or not the Purchasers may be allowed to intervene and be joined as defendants in the action.

**Held**: (1) from the provisions of the sale agreements, it is clear that the defendants had only acted as a bailee in relation to the said shares and the duly executed transfer forms relating thereto. In that capacity without any need for any express stipulations in the sale agreements that on the sale agreements being validly rescinded by either the vendor or purchasers, the defendants were legally bound to return the share certificates and the related documents to the plaintiff;

(2) if the Purchasers were joined as defendants in this action the court's judgment will bind every party who is interested in the subject-matter of this action, namely, the documents regarding the said shares;

(3) the Purchasers were therefore allowed by order of court to be joined as defendants.

*Case referred to:*

(1) *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.* [1969] 2 M.L.J. 52.

CIVIL SUIT.

*Upali Mascorale* for the plaintiff.
*C.K.G. Pillai* for the defendant.
*Raja Abdul Aziz bin Raja Addruse* (*Miss Eva Kwong* with him) for the parties.

*Cur. Adv. Vult.*

**Yusof Abdul Rashid J.**: On November 1, 1980 the plaintiff entered into sale agreements with twelve individuals ("the Purchasers") who were represented by the defendant, a practising advocate and solicitor, to sell the whole issued and fully paid-up shares numbering 1,907,480 in all of a limited company known as the Gabongan Putra Sdn. Bhd. ("the Company"). The plaintiff, by November 24, 1980, had delivered the Share Certificates and the Share Transfer Forms duly executed by the plaintiff ("the said documents") relating to the said 1,907,480 shares to the defendant pursuant to the said sale agreements to hold the same in the latter's custody as stakeholder. On September 26, 1981, the plaintiff, alleging that the Purchasers had breached Clause 11 of the sale agreements, purported to rescind the said sale agreement. Having taken such a step, the plaintiff demanded the return of the said documents from the defendant. On the defendant refusing to return them, the plaintiff brought this action in court claiming for a court order to compel the defendant to return the said documents. The defendant entered appearance and the plaintiff applied for a summary judgment under Order 14. On the other hand, the Purchasers filed a summons-in-chambers seeking leave to intervene. The issue to be determined, without going into the merits of the case, is whether or not the Purchasers may be allowed to intervene and be joined as defendants in this action.

The application by the Purchasers is made under Order 15 rule 6(2)(b) of the Rules of the High Court 1980 the provisions of which are –

"(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

contending that their interests would be affected by the order of the court. The terms of Order 15 rule 6(2)(b)(i) of the Rules of the High Court are terms which form part of the provisions of Order 16 rule 11 of the Rules of the Supreme Court 1957 which had been the subject of judicial exegesis. The Privy Council had occasion to consider the provisions of Order 16 rule 11 of the Rules of the Supreme Court 1957 the terms of which were as follows:–

"11. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, *who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.* No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special Order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice." [Emphasis added].

in the case of *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.*[1] The following opinion was expressed by the Privy Council at page 55 –

"... The Federal Court has the same power to add an additional party to an appeal as the High Court has to add a party to an action. This power is conferred by order 16, rule 11, of the English Rules of the Supreme Court. To come within the words of the rule the party to be added must be one "who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter". These words have been the subject of voluminous judicial exegesis and *Amon* v. *Raphael Tuck & sons Ltd.* contains a useful collection of citations to Devlin J. of many of the authorities prior to 1956. Devlin J.'s analysis of those authorities led him to reject the view expressed by Lord Esher M.R. in *Byrne* v. *Brown* that the rule ought to be given a wide interpretation so as "to secure that, when a court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other action may be brought in respect of that transaction, the court shall have power to bring all the parties before it, and determine the rights of all in one proceeding". Devlin J. himself accordingly propounded in *Amon's* case a much narrower interpretation of the rule which it is unnecessary to repeat here for it was over-ruled, in their Lordships' view rightly, by the Court of Appeal in *Gurtner* v. *Circuit* a case decided after the date of the judgment of the Federal Court of Malaysia in the present case.

The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases."

The Privy Council then enunciated a test to be applied by court in exercising the power to add a person as party to an action –

"... While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between "legal" and "commercial" interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"

In considering whether or not to allow the Purchasers to intervene, I have to apply the test as expounded by the Privy Council in *Pegang's* case. It is only for that purpose that I have to examine the facts surrounding the sale transaction but not for the purpose of disposing of the matter finally.

The Company is the proprietor of a piece of land held under Grant 1740 for Lot No. 1080, in the Mukim of Tebrau, Johore Bahru which it has charged to a Bank as security for an overdraft facility for about $4.6 million. It is the intention of the Company to develop the said land into a housing estate but it has not succeeded in its application for the change of use of the land nor for the subdivision into housing lots. The directors of the Company wish to have the company taken over by a group of twelve purchasers by selling the total issued and paid up shares of 1,907,480 to the Purchasers at different prices depending on whether or not the only asset of the Company, namely, the land, would enhance in value on it being rendered suitable to be developed into a housing estate. The plaintiff was given nine months to effect the

conversion of the land from agricultural to residential. Should the conversion prove abortive, the Purchasers, under the sale agreements, are given option either to complete the purchase of that 1,907,480 at approximately $1.50 per share or to rescind the sale agreements. In the event that the plaintiff has succeeded in procuring the approval of the conversion and subdivision of the said land, the value of each share would have enhanced to $6.00 per share.

One of the sale agreements, namely, the sale agreement entered into between the plaintiff and one of the purchasers, Loo Ping Kwong, is exhibited to the affidavit deposed by the plaintiff on November 23, 1981. The terms thereof are said to be identical in all respects, but for the number of shares purchased, with the other sale agreements entered into between the plaintiff and the other purchasers. The Purchasers allege, the allegations of which has not been disputed by the plaintiff, that they have paid the amounts due under Clauses 2(a), 3(1)(a)(ii) and 3(3)(a) of the sale agreements. The Purchasers allege that they have paid a sum of $2.8 million for the purchase of 1,907,480 shares of the Company. Thus, in relation to purchaser Loo Ping Kwong, for 159,000 shares he has paid about $241,683.00. In term of per share, the price is approximately $1.50. Purchaser Loo Ping Kwong has yet to pay the amount specified under Clause 2(c) for $708,366.00 but the said amount is only due on the conversion and subdivision of the land. It will mean that on the successful conversion and subdivision of the land, the value of the 159,000 shares would be enhanced by $708,366.00, rendering each share to rise in value to approximately $6.00. On the payment of $2.8 million by the Purchasers for the purchase of the 1,907,480 shares the obligations of the parties under the sale agreements are set out under Clause 4(d). In essence, in the event that approval for the conversion and subdivision of the land is not procured within nine months from the date of the sale agreements, the Purchasers are given the option either to complete the purchase or to rescind the sale agreements.

Under the sale agreements the approval for conversion and subdivision of the land shall be procured by the plaintiff on or before August 1, 1981. Evidently, such approval has not been obtained but on August 5, 1981 the Purchasers elected to complete the purchase. Thus, the Purchasers need to pay only $1.50 per share instead of $6.00. The sale and purchase of the said 1,907,480 shares shall be completed under Clause 6.

From the facts deduced above, the deduction being made purely on reading the sale agreement relating to purchaser Loo Ping Kwong and the affidavits filed, it is clearly shown that it has been the intention of the Purchasers that as from August 1, 1981 or thereabout, they are to take over the Company completely. This to my mind should also include the taking over of the liabilities of the Company which under the sale agreements constitute the overdraft facilities amounting to $4.6 million and the liabilities of the guarantors in relation to the said facilities. This is stipulated under Clause 11 of the sale agreements in the following terms –

> "11. The Vendor shall do all within his power to ensure the continuance of the credit and/or other facilities granted on the security of the existing charge (hereinafter called "the said charge") on the land notwithstanding the transfer of the said shares hereunder. In the event that the Vendor shall be unable to obtain the said continuance of credit facilities and charge aforesaid by the date of completion the Purchaser shall repay such portion of principal loan and interest outstanding as at the date hereof as the said shares bear in relation to the paid-up shares. The Purchaser shall arrange for the previous guarantors of the said Charge to be released by Messrs. Bank Bumiputra Malaysia Berhad before the 1st day of May, 1981.".

The logical conclusion one would arrive at on reading the sale agreements as a whole is that before the Purchasers took over the Company completely on August 1, 1981, they shall first make arrangements to ensure the continuance of the credit facilities with the bank or pay up the sum due and owing and to discharge the liability of the guarantors before May 1, 1981. It is clear that the Purchasers have made no such arrangements. Hence, it cannot honestly be said that the Purchasers have taken over the company completely on the relevant date.

When the Purchasers failed to make the requisite arrangements as set out under clause 11, the plaintiff purported to have rescinded the sale agreements on September 26, 1981.

It is convenient at this stage to examine the obligations of the defendant under the sale agreements. The following clauses set out thereunder are relevant –

(a) *Clause 3(1)(a)(i)* –

> "The *Purchasers solicitors* Messrs. Hassan Yunos & Co. shall deliver to the Vendor's solicitors as stakeholders the first payment to be released in accordance with the terms hereunder.".

(b) *Clause 3(2)(a)(i)* –

"Within twenty one (21) days from the date hereof:

The Vendor's solicitors shall deliver to the *Purchaser's solicitors* as stakeholders the share certificates and the relative transfer forms relating to at least one hundred and forty three thousand one hundred (143,100) of the said shares less the Vendor's shares."

(c) *Clause 3(3)(b)* –

"Within two (2) months from the date hereof the Vendor shall deliver to the *Purchaser's solicitors* the share certificates and duly signed transfer forms in respect of a further 5% of the said shares over and above the 90% of the shares effectively delivered pursuant to Clause 3(2)(a)(i).".

(d) *Clause 3(4)(a)* –

"Within three (3) months of the date hereof the Vendor shall deliver to the *Purchaser's solicitors* the share certificates and duly executed transfer forms in respect of the balance of the said shares (i.e. the final 5%).".

(e) *Clause 6(a)*

"Upon completion as aforesaid:

The *Purchaser's solicitors* shall release and deliver the aforesaid share certificates and relative transfer forms received by them pursuant to Clauses 3(2)(c)(i) and/or 3(3)(a) and/or 3(4)(a) to the Purchaser or such other person or persons as the Purchaser may nominate.".

From the provisions stated above it is clear that pursuant to the sale agreements the defendant only acts as a bailee in relation to the 1,907,480 shares and the duly executed transfer forms relating thereto. It is also clear that in that capacity without any need for any express stipulations in the sale agreements that on the said sale agreements being validly rescinded by either the vendor or purchasers, the defendant is legally bound to return the share certificates and the related documents to the plaintiff. Hence, the defendants need only to rely on the order of the court to totally discharge his liability as such bailee. There is no doubt at all, however, that the share certificates and the related documents are kept in the defendant's custody pursuant to the sale agreement. As such, it is necessary first to determine the status of the said sale agreements.

Having stated the facts in some detail, I will now apply them according to law to ascertain whether or not the Purchasers may be allowed to intervene in this action. As stated earlier I will apply the test as expounded by the Privy Council in the case of *Pegang*.

A "Will his (the intended interveners') rights or liabilities to any party to the action in respect to the subject matter of the action be directly affected by any order which may be made in the action?".

It is the contention of the plaintiff in this case that he has validly rescinded the sale agreements in B respect of the 1,907,480 shares of the Company and claims for the return of the documents from the defendant who is only holding them as stakeholder or bailee. It is a fact that the defendant has come into possession of the documents pursuant to the sale agreements. In consequence, before I C could make an order for the return of the documents to the plaintiff, I have to be satisfied that the alleged rescission was validly made by the plaintiff. Should the defendant choose not to defend the action, the plaintiff shall be entitled to judgment as prayed. This means that as between D the plaintiff and the defendant, the judgment of the court will be that the rescission was valid and the plaintiff is entitled to the documents. Under those circumstances, would the judgment affect the rights of Purchaser? I have no hesitation in finding that judgment will affect the Purchasers' E rights, for, having decided that the defendant is in possession of the documents pursuant to the sale agreements, in ordering the defendant to return the documents, the irresistible effect of such a direction is that there is a pronouncement that the sale agreements have ceased to exist. On the F other hand, if the appellant chooses to defend the action, I have to deliberate in depth what interpretation may be attributed to Clause 11 within the context of the sale agreements as a whole. Let us assume that in the light of all the circumstances, my judgment were that the plaintiff was within his legal rights to rescind the sale agreements under G Clause 11 thereof. As the judgment revolves round the interpretation of a provision in the sale agreement, such interpretation cannot be different irrespective of which party were to appear. As such, there is no doubt at all that the said judgment would affect the Purchasers' rights adversely since H the Purchasers would not be able to found their action on sale agreements which have ceased to exist. However, at this stage, I refrain from expressing my opinion on this issue.

To my mind if the Purchasers are joined as I defendants in this action my judgment will bind every party who is interested in the subject-matter of this action, namely, the documents regarding the 1,907,480 shares of the Company. I am satisfied that by allowing the Purchasers to be joined as defendants, I will be able to determine all mat-

ters in dispute in the cause effectually and completely.

It is hereby ordered that –

(i) the Purchasers shall be joined as defendants in this action;

(ii) the Purchasers as defendants, shall be at liberty to enter appearance within fourteen days from this date;

(iii) should the plaintiff be mindful in proceeding with his application for a summary judgment under Order 14, such application shall be heard before me in Open Court on 30.1.82.

(iv) Costs in the cause.

*Order accordingly.*

Solicitors: *Jackson & Masacorale; Hassan Yunos & Co., Yee & Kwong.*

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## THEIN THAM SANG v. UNITED STATES ARMY MEDICAL RESEARCH UNIT & ANOR.

**[O.C.J. (Hashim Yeop A. Sani J.) March 20, 1982]**
**[Kuala Lumpur – Originating Motion No. A24 of 1981]**

*Industrial Relations – Reference to Industrial Court by workman/claimant over dismissal by her employer – Death of claimant – Whether reference abated on death of claimant – Industrial Relations Act 1967, S. 20(3) – Specific Relief Act 1950, s. 44(1)*

*Labour Law – Reference to Industrial Court by workman/claimant – Death of workman – Reference abated on death*

The facts in this case were as follows. One Elizabeth Thein (now deceased) was the claimant in a reference under section 20(3) of the Industrial Relations Act 1967. The dispute arose out of the dismissal of the claimant by her employer, the first respondent. While the reference was awaiting hearing the claimant died.

On April 7, 1981 the solicitors of the deceased claimant wrote to the Industrial Court and gave notice that the deceased claimant would now be represented by her surviving husband, the present applicant. On the same day, the solicitors for the employer wrote to the Industrial Court asking for postponement of the hearing because counsel concerned was involved in a High Court case elsewhere. In the same letter they intimated that they would be raising a preliminary issue at the hearing. The preliminary issue was that the reference ought to be struck out because of the death of the claimant.

When the reference was finally heard arguments on the preliminary issue were considered by the Industrial Court. The court ruled that "a reference under sub-section (3) following representations for reinstatement made under sub-section (1) of section 20 of the Act abates on the death of the workman/claimant. An employee's claim to reinstatement expires along with his death and it no longer remains a dispute capable of settlement or adjudication. Therefore, a reference of such a dispute goes beyond the purview of the Industrial Relations Act 1967".

The applicant contended, *inter alia*, that the Industrial Court was wrong in its finding that the reference abated on the death of the claimant. The court was faced with 2 issues: (1) whether the applicant was in law entitled to a relief under chapter VIII of the Specific Relief Act 1950;

(2) whether the reference under section 20(3) of the Industrial Relations Act 1967 abates on the death of the claimant.

**Held,** dismissing the application: (1) before an order under section 44(1) of the Specific Relief Act 1950 could be issued the claimant has to show that his personal right would be injured if the order is not made by the court. Nowhere in the affidavit of the applicant was it stated that he had such personal right or that the personal right would be injured if the order was not given;

(2) proviso (b) to section 44(1) requires the applicant to show that it was clearly incumbent on the Industrial Court to hear and determine the said reference. In this case it was not a fact that the Industrial Court refused to hear the case. It was really a case where the Industrial Court heard the case and decided on a preliminary issue which was within its jurisdiction;

(3) proviso (d) to section 44(1) provides that no order may issue under that section except where the applicant has no other specific and adequate legal remedy. In the applicant's case the award was only an interim order dealing with the preliminary point raised by the employer. Section 20(4) of the Industrial Relations Act does not operate as a bar to any action for damages in any court in respect of the alleged wrongful dismissal. The right to sue for money or equivalent of money due to a deceased workman whilst the case was pending before the Labour Court survives to the heirs, successors and legal representative and they can take action by way of a suit in a civil court;

(4) section 20 is a claim for reinstatement and is a claim personal to the claimant. Thus the action abated with the death of the claimant.

*Cases referred to:*

(1) *Koon Hoi Chow* v. *Pretam Singh* [1972] 1 M.L.J. 180.
(2) *Haramani Naik & Ors.* v. *Management Samaj & Anor.* [1978] Lab. I.C. 1630.
(3) *Yad Ram* v. *Bir Singh* [1974] Lab. I.C. 970.

ORIGINATING MOTION.

*C.T. Khaw* for the applicant.
*C.V. Dass* for the respondent.

*Cur. Adv. Vult.*